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IN THE

SUPREME COURT OF THE UNITED STATES

JULY TERM, 1991

KATHLEEN ANN STEWART,

Petitioner,

vs.

FORT WAYNE COMMUNITY SCHOOLS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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*James P. Fenton
Thomas M. Kimbrough
Kevin K. Fitzharris
BARRETT & McNAGNY
215 East Berry Street
Fort Wayne, Indiana 46802
(219) 423-9551
Counsel for Respondent,
Fort Wayne Community Schools

*Counsel of Record

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the Fort Wayne Community Schools to discharge Kathleen Ann Stewart constituted an arbitrary and capricious deprivation of a protected property interest in violation of her federal constitutional right to substantive due process and, thus, in violation of her rights under 42 U.S.C. §1983.

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OPINIONS BELOW

On November 4, 1988, the Whitley Circuit Court (Whitley County, Indiana), entered judgment in favor of Respondent, Fort Wayne Community Schools ("FWCS"), affirming the School Board's decision to cancel Petitioner's, Kathleen Ann Stewart's

("Stewart"), contract with the school district.

In a published opinion issued October 16, 1989, the Court of Appeals for the Third District of Indiana reversed judgment for FWCS and remanded to the Trial Court for proceedings consistent with its opinion that FWCS wrongfully terminated Stewart.

On December 27, 1990, the Supreme Court of Indiana, by a published opinion, reversed the Appellate Court's ruling and affirmed the Trial Court's decision declaring the School Board's decision to cancel Stewart's contract with the School Board lawful.

On March 21, 1991, the Supreme Court denied Stewart's Petition For Rehearing Without Opinion.

All Court entries listed above are contained in Petitioner's Appendix for Writ of Certiorari.

JURISDICTION

Stewart's Petition for Writ of Certiorari arises from the denial of Petitioner's Request For Rehearing by the Supreme Court of Indiana on March 21, 1991.

Jurisdiction of this Court is invoked by Stewart under 28 U.S.C. §1257.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions relevant to Stewart's petition for Writ of Certiorari are contained in Stewart's Petition.

STATEMENT OF THE CASE

Stewart brought an action against FWCS when FWCS cancelled her contract with the school district.

On November 4, 1988, the Whitley Circuit Court, by The Honorable Edward J. Meyers, entered judgment in favor of FWCS

declaring all statutory procedures regarding the cancellation of Stewart's contract were followed by FWCS. In addition, the Trial Court found no evidence was submitted nor advanced by Stewart to support a claim based on a violation of substantive due process.

The Court of Appeals for the Third District of Indiana reversed judgment in favor of FWCS and found the School Board's action in cancelling Stewart's contract was arbitrary and capricious by following a rescinded policy. Because FWCS followed a rescinded policy in cancelling Stewart's contract, the Court found the actions of FWCS were arbitrary and capricious depriving Stewart of a protected property interest in violation of her federal constitutional right to substantive due process and, thus, in violation of her rights under 42 U.S.C. §1983.

The Supreme Court of Indiana disagreed with the Court of Appeals and ruled in favor of FWCS declaring the decision of the School Board to discharge Stewart was not arbitrary and capricious giving rise to a §1983 action. The Court found the new 1983 policy did not expressly rescind the dual certification requirement of the prior 1981 policy. In addition, even if it could be argued the new policy did rescind the old, the Court found the 1983 policy was not ignored by the School Board in deciding to cancel Stewart's contract. The 1983 policy enunciated only a very general standard which left the Board with a large degree of discretion. It stated only the reductions in administrative staff would occur in a "manner that is fair and equitable after the qualifications of the individuals potentially involved have been reviewed." (R. at 270). In light of all the evidence presented to the Board by Stewart,

including the evidence that was adverse to her case, the Board decision was fair and equitable, and thus in full compliance with its 1983 employment policy.

Relevant Facts

Stewart was hired by FWCS as a psychometrist in 1978. During her years with the school system, the student population continually declined, the property tax was frozen and federal funds were constricted. Under these combined pressures, the school system was forced to reduce its teaching and administrative staff, including its staff of psychometrists. In May of 1981, Dr. William Anthis, the Superintendent of the school system, met with the psychometrists, including Stewart, to notify them of the impending reductions in force. Dr. Anthis advised them that as the administrative staff was reduced, those

remaining would need to be able to wear a variety of professional hats. He indicated that an employee who held multiple certifications from the State would have a better chance of being retained than an employee who held only one certificate. Stewart held only one certificate, but began taking classes towards a classroom teaching certificate. In the fall of 1981 and the summer of 1982, she took a total of 24 hours of classes toward a classroom teaching certificate, but stopped more than 30 hours short of achieving this license.

Preparing for reductions in personnel, in November of 1981 the School Board decided to combine the previously separate positions of psychometrists and guidance counselors. Under state law, guidance counselors were required to have both a classroom teaching certificate and a guidance counselor certificate. The School Board acknowledged in its 1981 Employment

Policy that in some situations it may be necessary to give a psychometrist a period of time to fully meet the certification requirements of the position to which he/she is assigned. Those who were to be retained but who were still working toward a required certification would hold the title of acting psychometrist/counselor. Stewart was not certified as a classroom teacher nor as a counselor.

During November of 1981, a committee interviewed all psychometrists and counselors to determine who should remain in the reduced number of combined psychometrist/counselor positions. The committee considered four factors: the number of certificates held by the applicant, the applicant's interest, seniority, and other qualifications. Stewart, of course, held only one certificate. In addition, the committee members felt Stewart had not exhibited much

interest in pursuing her counselor certificate. They noted, for example, that she had responded ambivalently to a questionnaire regarding her preferred future assignments. More specifically, Stewart turned in her preference sheet nine days after it was due and put a question mark in the box for psychometrist/counselor.

On March 22, 1982, Stewart was notified she would be laid off at the end of the school year along with six other employees. Of those being retained in the acting psychometrist/counselor position, two were non-tenured psychometrists who held both psychometrist and teaching certificates but did not hold counselor certificates. Stewart complained to Superintendent Anthis in writing:

> In my interview with the committee, I was asked for an instantaneous commitment [sic] of intent to seek additional certification in counseling. Since such a commitment [sic] would mean

> a definite change in lifestyle and career goals, this kind of instantaneous ultimatum seems an unfair labor practice. Indeed, to even call this an interview when one is already employed seems facetious and an attempt to escape fair labor practice.

(R. at 137).

Because the Board failed to notify Stewart that a state statute offered her the right to a pre-termination hearing, it decided to reinstate her for the 1982-83 school year as a psychometrist. By virtue of this re-hire, Stewart obtained tenure. It is her status as a tenure teacher that serves as the legal predicate for Stewart's lawsuit.

During the next school year, Deputy Superintendent Dr. James Robbins notified Stewart by letter that the continuing decline in student enrollment necessitated further cut-backs in administrative personnel. Dr. Robbins' letter noted the

school system needed employees with dual certifications, that Stewart had only a psychometrist certificate, and that Stewart had less seniority than any other psychometrist with a single certificate. Dr. Robbins concluded his letter to Stewart by stating the Superintendent was recommending to the School Board that her contract be cancelled at the end of the school year. His letter also informed her she could contest the Superintendent's recommendation by requesting a hearing with the School Board.

Stewart did request a hearing, and a hearing was held on March 14, 1983. At this hearing, the Superintendent presented the reasons for his recommendation and Stewart was given an opportunity to respond and present evidence. On March 28, 1983, the School Board released its findings and conclusions. It decided Stewart's contract should be cancelled, effective June 17,

1983. Thereafter, Stewart sued the school system in the Whitley Circuit Court.

REASONS FOR DENYING THE WRIT

Stewart was a tenured teacher pursuant to the Indiana Teacher Tenure Statute. As such, Stewart had a property interest in her job that is protected by the Fourteenth Amendment. Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972); Perry v. Sinderman, 408 U.S. 593, 33 L.Ed.2d 570, 92 S.Ct. 2694 (1972). Stewart does not submit her procedural due process rights under the Fourteenth Amendment were violated when she was terminated. Indeed, such a submission would fail. Stewart was notified the Superintendent of FWCS was recommending to the School Board her contract be cancelled and she could contest the Superintendent's recommendation by requesting a hearing with the School Board. After a hearing was

requested, the Superintendent presented the reasons for his recommendation and Stewart was given an opportunity to respond and present evidence. Instead, Stewart contends her substantive due process rights under the Fourteenth Amendment were violated when her contract was cancelled.

A claim that one is entitled to substantive due process means that state action which deprives him/her of life, liberty, or property must have a rational basis - that is to say, the reason for the deprivation may not be so inadequate that the judiciary will characterize it as arbitrary. Jeffries v. Turkey Run Consolidated School District, 492 F.2d 1 (7th Cir. 1974). Applying this principal to the instant action, the doctrine of substantive due process provides the actions of the School Board in terminating Stewart's contract must not be "arbitrary and capricious." Korf v. Ball State

University, 726 F.2d 1222 (7th Cir. 1984). Stewart contends the action of the School Board in cancelling her contract was arbitrary and capricious because the Board relied on the 1981 Employment Policy rather than the 1983 policy. Thus, Stewart calls upon this Court to make a factual determination: Whether the School Board solely relied upon the 1981 policy in terminating her employment with FWCS.

This Court has previously declared that a Petition for Writ of Certiorari will not be granted where the case involves merely a review of findings of fact which would be of no importance save to the litigants themselves. Rudolph v. U.S., 370 U.S. 269, 8 L.Ed.2d 484, 82 S.Ct. 1277 (1962); Crumady v. "Joachim Hendrick Fissel", 358 U.S. 423, 3 L.Ed.2d 413, 79 S.Ct. 445 (1959); Southern Power Company v. Pub Service Company, 263 U.S. 508, 68 L.Ed. 413, 44 S.Ct. 164 (1924). Stewart's

Petition for Writ of Certiorari is such a case. The Trial Court and the Supreme Court of Indiana previously determined FWCS did not expressly rescind the dual certification requirement of the 1981 policy and did not ignore the 1983 policy in terminating Stewart. Unhappy with the result obtained in the Trial Court and the Indiana Supreme Court, Stewart seeks to take the U.S. Supreme Court on a journey back to Indiana to redetermine whether FWCS based its decision to terminate her contract solely on the 1981 policy. Such a journey would not include the consideration of an "important question of federal law . . ." as required by Supreme Court Rule 17.1(C), but rather a review of the facts of no more importance than to the litigants themselves. Hence, this case is a poor candidate for certiorari in view of the limited number of parties affected. Another determination of which policy FWCS

relied upon in terminating Stewart would not create rights or obligations of universal application. Even if this Court would review the facts of this case once again, it would find FWCS did not expressly rescind the dual certification requirement of the 1981 policy and did not ignore the 1983 policy in terminating Stewart.

Stewart claims the School Board improperly applied the dual certification requirement contained in the old 1981 employment policy when it decided to terminate her. She argues this was improper because the dual certification requirement was officially rescinded by the 1983 policy. This argument is without merit. Stewart's attorney did not argue at the School Board Hearing in March of 1983 the dual certification requirement had been rescinded by the 1983 policy, nor did he try to enter the 1983 policy into evidence at the School Board Hearing. Although the

1983 policy did rescind the formal 1981 policy statement, it is clear the Board's interest in having personnel with dual certification survived. The 1983 policy, itself, did not expressly rescind the dual certification requirement. On the contrary, the dual certification requirement took on life of its own, outside the confines of the formal 1981 policy statement. The formal 1981 policy was not the only way Stewart had heard about the importance of having dual certifications. Dr. Anthis informed the psychometrists in 1981 the school system was beginning a belt tightening period, and that employees with dual certifications had the best chance of being retained. Moreover, Stewart has never argued she stopped working on her classroom teaching certificate because of her belief the dual certification requirement had been rescinded by the 1983 policy. Instead,

Stewart stopped working on her second certificate after the summer of 1982, six months before the 1983 policy was even announced.

Stewart also argues the School Board ignored its 1983 policy by failing to cite the policy in its findings. The 1983 policy was not ignored by the School Board. The 1983 policy enunciated only a very general standard which left the Board with a large degree of discretion. It stated only that the reductions in administrative staff would occur in a "manner that is fair and equitable after the qualifications of the individuals potentially involved have been reviewed." (R. at 270). Although not reproduced verbatim in the Board's findings, this standard was fully met. Stewart was permitted to present her qualifications to the Board during her Hearing. In light of all the evidence presented to the Board,

including the evidence that was adverse to Stewart's case, the Board's decision was "fair and equitable," and thus in full compliance with its 1983 employment policy. Because the School Board's decision to terminate Stewart did not violate its own employment policy, it was not arbitrary and capricious. Without an arbitrary and capricious governmental decision to support her substantive due process claim, Stewart's §1983 claim fails.

CONCLUSION

For the reasons set forth above, it is respectfully submitted this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

BARRETT & McNAGNY

By James P. Fenton

James P. Fenton
215 East Berry Street
P.O. Box 2263
Fort Wayne, IN 46801
(219) 423-9551
Counsel for Respondent,
Fort Wayne Community Schools